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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
GTE CORPORATION,	)	
Transferor	)	
and	)	**CC Docket 98-184**
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
For Consent to Transfer of Control	)	

KMC TELECOM INC.'S OPPOSITION TO APPLICATIONS FOR TRANSFER OF CONTROL OF GTE CORPORATION

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SUMMARY

Bell Atlantic Corporation and GTE Corporation have failed to meet their burden of proving that the proposed merger will be consistent with the public interest, convenience and necessity. The merger will create an entity that controls one-third of the nation's local access lines and will in no way promote or encourage the development of local exchange competition. Fear of retaliation is likely to keep Bell Atlantic/GTE from entering the local exchange territories currently dominated by the other incumbent local exchange carriers. Moreover, neither Bell Atlantic nor GTE need the other in order to compete out-of-region – each on its own is big enough and resourceful enough to go it alone. For these reasons, the Commission must deny GTE's requests for transfer of control.

KMC submits that the Commission cannot rely upon conditions alone to mitigate the potential anticompetitive effects of the merger. The Commission imposed conditions on approval of the Bell Atlantic/NYNEX merger that were designed to facilitate the development of competition in the Bell Atlantic and NYNEX service territories. Those conditions have not proven sufficient to compel Bell Atlantic's compliance with its obligations under Sections 251 and 252 of the Telecommunications Act of 1996, forcing CLECs to file complaints with State Commissions to enforce their rights under the Act. Moreover, at least one competitive carrier has filed a complaint with this Commission charging Bell Atlantic with specific violations of the conditions. If the Commission is inclined to approve the merger, despite the absence of any public interest benefit, the Bell Atlantic/NYNEX experience dictates the necessity not only of conditions, but also of steep financial penalties for violation of the conditions. The prospect of having to pay for derelictions in compliance may provide the additional incentive needed to ensure that the conditions serve their intended purpose.

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KMC Telecom Inc. ("KMC") and its affiliates are competitive local exchange carriers authorized to provide service in seventeen states and Puerto Rico. KMC currently offers local exchange service in competition with GTE Corporation ("GTE") operating entities in Florida, Indiana, Virginia, and Wisconsin and in competition with Bell Atlantic in Virginia. Bell Atlantic and GTE have failed to meet their burden of proving that Bell Atlantic's acquisition of GTE will serve the public interest in promoting competition in the nation's local exchange markets. Both Bell Atlantic and GTE have strenuously resisted the entry of competitors into their existing local exchange markets. Approval of the merger will simply result in a behemoth that controls over one-third of the local exchange access lines across the country, making it even more difficult for competitors such as KMC to gain a foothold in the markets that the new and enlarged Bell Atlantic dominates. Having failed to demonstrate that the merger is pro-competitive, Bell

Atlantic and GTE should not be permitted to join forces. The Commission should deny GTE's applications for transfer of control.

I. THE MERGER WILL NOT PROMOTE COMPETITION

Bell Atlantic and GTE bear the burden of demonstrating that the proposed merger will serve the public interest, convenience and necessity.[1] In order to meet this standard, the applicants must show that the merger will enhance competition or, at the very least, not impede the development of competition.[2] Pursuant to Sections 214(a) and 310(d) of the Communications Act, the Commission must be persuaded that the harms to competition – i.e., the increased market power, the slowing of a decline in market power or the impairment of the Commission's ability to establish and enforce regulations necessary to achieve the competition that can replace regulation -- will be outweighed by the benefits that enhance competition. Bell Atlantic and GTE have failed to meet this burden.

This merger, in combination with the merger of SBC and Ameritech, will transform the face of local competition in this country, creating a market in which two giant companies together control over two-thirds of the nation's total local access lines and an even larger share of business access lines. Bell Atlantic already controls over 41 million access lines[3] and serves the

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[1] *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic/NYNEX Merger Order*"), ¶ 2.

[2] *Id.*, at ¶¶ 37-38.

[3] Bell Atlantic Media Fact Sheet, http://www.ba.com/kit/ (visited Oct. 30, 1998)

headquarters of 175 of the Fortune 500 companies.[4] After merging with GTE, the combined company will have 63 million access lines,[5] or over one-third of the access lines in the country. If this merger and the SBC/Ameritech merger are approved, the two companies will share 67% of the country's access lines.[6]

There is no question that Bell Atlantic's acquisition of GTE, the major independent telephone company, will go a long way towards expanding the Bell Operating Companies' monopoly control of the local exchange market in this country. Such a result cannot be reconciled with the intent of the Telecommunications Act of 1996. The Act was designed to promote and encourage the development of competition in the local exchange markets, not to recreate, much less extend the reach of, the old Bell monopoly. The result is particularly egregious because neither GTE nor Bell Atlantic has fully opened its own markets to competition as contemplated by the 1996 Act. Indeed, both have strenuously resisted implementation of the market-opening measures required by Sections 251 and 252 of the Act. In these circumstances, the Commission should not approve a consolidation of the two monopolies, thereby giving them

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[4] "Bell Atlantic and GTE Agree to Merge," Press Release July 28, 1998, http://www.ba.com/nr/1998/Jul/19980728001.html

[5] *Id.*

[6] In addition, the two merged companies combined will serve the headquarters of 80% of the Fortune 500 companies. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications, Inc., Tranferee,* Affidavit of James S. Kahan, ¶49 (224 Fortune 500 companies are headquartered in the 13 states served by SBC, Ameritech and SNET).

increased market power and an increased incentive to impede competition in their own local exchange regions.

Bell Atlantic and GTE argue that the merger will not adversely affect competition, because they do not presently compete against each other. However, under section 7 of the Clayton Act, which the Commission must consider in reviewing proposed mergers,[7] the Commission is required to consider "not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963). A realistic assessment of the impact of the merger on future competition is particularly important in the dynamic and changing telecommunications market. If the Commission approves this merger and the SBC/Ameritech merger, control of the majority of the nation's local exchange access lines will be concentrated in the hands of two RBOCs. Such concentration cannot help but have a severe adverse impact on the future of local exchange competition.

A. The Merger Will Increase The Incentive Of The Merged Company To Resist Opening Its Markets.

In the *Bell Atlantic/NYNEX Merger Order*, the Commission recognized that a merger between two major incumbent local exchange companies is likely to increase their ability and incentive to resist the pro-competitive process.[8] While the Commission did not find that the reduction in the number of BOCs from six to five resulting from joinder of Bell Atlantic and

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[7] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-255, CC Docket No. 97-211, ¶ 9 (1998) (*"MCI-WorldCom Order")*.

[8] *Bell Atlantic/NYNEX Merger Order*, ¶ 154.

NYNEX merger sufficient to render the merger against the public interest, it warned that "further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns."[9] Those serious public interest concerns are present here, especially because the proposed merger will reduce the incentives of Bell Atlantic to cooperate in the market-opening process.

Section 271 of the Act creates at least some incentive for Bell Atlantic to implement market-opening measures. At present, Bell Atlantic is attempting to convince the New York Public Service Commission that it has met all of the Section 271 requirements for entry into the long-distance market, and presumably will move quickly to make a similar showing in its other in-region states if it succeeds in New York. By contrast, GTE is already in the long-distance market and has nothing to gain by meeting the Competitive Checklist requirements incorporated in Section 271. With no motivation to open its local markets, GTE vigorously has fought the entry of competitors into its service territories.[10] GTE's "scorched-earth" tactics have been highly successful in keeping meaningful competition out of its service areas.[11] Post- merger,

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[9] *Id.*, at ¶156.

[10] The difference between GTE and the RBOCs became apparent soon after the 1996 Act was passed. Ameritech's CEO was quoted as saying: "The big difference between us and them [GTE] is they're already in long distance. What's their incentive to cooperate?" "Holding the Line on Phone Rivalry, GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay," Washington Post, October 23, 1996, at C12.

[11] The success of GTE's tactics is well documented. In its response to the Second CCB Survey on the State of Local Competition, GTE reported the total of local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines GTE provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: California - 0.9%; Florida - 1.7%; Hawaii - .02%; Illinois - .005%; Indiana - .0007%; Kentucky - 0.2%; Michigan - 0%; North Carolina - 0.2%; Ohio - .004%;

Bell Atlantic/GTE will have to consider whether the possible benefits of implementing market-opening measures that might have been advantageous for Bell Atlantic might be offset by the adverse impact of opening up the market in GTE's service areas. With control of over one-third of the nation's access lines at stake, the merged company may well conclude that Section 271 approval is not worth the cost of allowing competition to develop in its local exchange markets.

The Commission has recognized that a new entrant's success in building customer good will by providing reliable, high quality service depends heavily on the cooperation of the incumbent LEC that provides it with interconnection, unbundled elements and resold services. The new entrant's success can be frustrated where the incumbent LEC engages in discriminatory conduct affecting service quality, reliability or timeliness.[12] As the number of incumbent LECs is reduced through the merger process, the power to determine when, where and if competition will develop becomes more highly concentrated. Where, as here, the merger is between two ILECs that both have resisted the entry of competitors into their service territories, the effect on competition will be not be positive.

Oregon - .026%; Pennsylvania - .01%; Texas - 1.1%; Virginia - .02%; Washington - .02%; Wisconsin - .06%. http://www.fcc.gov/ccb/local-competition/survey/responses In 11 of the 14 states in which it provides local exchange service, GTE is not furnishing UNEs to any competing carrier. *Id.*

The comparable figures for Bell Atlantic, while also disturbingly low, are an order of magnitude higher than GTE's figures. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines Bell Atlantic provided other carriers, 12.3% were provisioned using UNEs. *Id.*

[12] *Bell Atlantic/NYNEX Merger Order*, at ¶ 42.

In deciding whether to cooperate on particular market-opening measures, the merged entity will clearly weigh the impact of what it does on new entrants. Many CLECs operate in several markets and thereby achieve efficiencies by spreading overhead costs. If the ILEC from which a CLEC seeks network access or interconnection can make entry in one market prohibitively expensive, the CLEC's cost of entry in other markets will increase. If those other markets are in another ILEC's territory, the collateral effect would not figure into the ILEC's calculation on how hard to resist competition. Where the ILEC controls one-third of the country's local telephone lines, however, it is likely that some of the other markets targeted by the CLEC will also be in its region, and thus the collateral effect of making it more difficult for the CLEC to enter those other markets within the merged company's expanded region would be an additional reason to resist and delay the implementation of market-opening measures.

By expanding the scope and reach of both GTE's and Bell Atlantic's existing monopolies and increasing the resources available to defend those monopolies, the merger will significantly delay, if not eliminate, the possibility that competition will develop sufficiently to constrain market power and obviate the need for regulation in their local exchange markets.

B. The Merger Will Increase The Probability That The Present Geographical Division of Markets Between ILECs Will Be Maintained.

The Commission has recognized that "[a]s the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers."[13] To date, the existing ILECs, with few exceptions, have maintained a geographical division of markets by

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[13] *Bell/Atlantic/NYNEX Merger Order,* at ¶ 121.

refraining from significant competitive forays into each other's territories – despite the fact that each ILEC has far more assets and far greater expertise in the provision of local exchange service than most CLECs. Maintenance of that geographical division of markets represents a "mutually beneficial market equilibrium, to the detriment of consumers."

The recent merger applications, however, hint that the geographical division of markets may start to erode. For example, in the SBC/Ameritech merger application, the applicants told the Commission that the prospect of significant competition from large non-ILEC companies (such as MCI WorldCom) for the local exchange business of their large corporate customers has led them to conclude that they must compete out-of-region for these customers or risk losing their business in-region.[14] Pre-merger filing, Ameritech had made an out-of-region competitive foray into the SBC market of St. Louis, and had obtained CLEC certification in the SBC states of Texas and California.[15]

Likewise, GTE acknowledges that it has "an imperative to compete given its island-like service areas in the other Bells' seas," and consequently "already has established a separate corporate unit to plan for entry into territory close to its own few urban franchise areas near Los Angeles, Dallas, Tampa, and Seattle."[16] GTE is also "currently testing the use of its own wireless switch in San Francisco to provide local wireline service in SBC territory."[17] GTE also has

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14 SBC/Ameritech Public Interest Statement, Affidavit of James S. Kahan, ¶ 13.

15 SBC/Ameritech Merger Proceeding, Ex Parte Letter dated October 13, 1998 from Antoinette Cook Bush, Counsel for Ameritech.

16 Application at 7.

17 Kissell Affidavit ¶ 13.

recently started advertising that it will provide local service in the Ameritech city of Columbus, Ohio.[18] In addition, GTE shares an MSA or serves the suburbs of several other cities presently controlled by SBC, Ameritech and BellSouth, including San Diego, Houston, Chicago, Cleveland, Indianapolis, Detroit, Orlando, Jacksonville, and Portland.[19] These areas are natural targets for competitive forays by GTE.

Unfortunately, this merger, in conjunction with the SBC/Ameritech merger, lessens the likelihood that the merged companies will find it in their interest to disturb the "mutually beneficial equilibrium" represented by the existing geographical division of markets. In the SBC/Ameritech merger application, the parties candidly acknowledge that they expect any attempt to enter out-of-region markets to elicit retaliation by the incumbent LEC.[20] But neither they nor GTE and Bell Atlantic acknowledge the implications of the prospect of retaliation. Given that prospect, the ILEC planning an out-of-region competitive foray has to consider whether the benefits of the possible additional business to be garnered outweigh not only the direct cost of the foray, but also the cost of defending against a retaliatory raid and the loss of its own business that might result. If, for example, GTE/Bell Atlantic were considering a competitive foray into Chicago or Los Angeles, it would have to decide whether the prospective new customers it may win would outweigh the potential customers it may lose from a retaliatory raid by SBC/Ameritech into New York City or Boston.

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[18] An advertisement stating that GTE is offering basic telephone service appeared in the November 4, 1998 Columbus *Dispatch*.

[19] SBC/Ameritech Public Interest Statement at 2.

[20] SBC/Ameritech Public Interest Statement at 7-8.

In these circumstances, the likely result is that both parties will find it mutually beneficial to refrain from competitive forays into each other's territory – thereby continuing to collect the profits from their own monopolies, while avoiding the risk and expense of competitive warfare in each other's territory. Thus this merger, in combination with the SBC/Ameritech merger, lessens the chance that the incumbent LECs will seek to compete in one another's territories.

This analysis is particularly relevant to the merger of GTE with an RBOC. As the Commission has acknowledged, if a market participant has "something to lose" from competition, it is more likely to participate in tacit market-sharing arrangements.[21] Absent the merger, GTE might not have much to lose by mounting competitive challenges in urban areas such as Los Angeles or Chicago or San Francisco. Given GTE's predominantly rural and suburban service areas, it would have less to lose if SBC/Ameritech were to retaliate; and SBC/Ameritech might decide that GTE's service areas are simply not an attractive enough target for retaliation. The calculation changes dramatically, however, once GTE merges with Bell Atlantic. At that point, the possible targets for retaliation include New York City and the entire Boston-Washington corridor – markets teeming with lucrative business customers, presenting an attractive target for retaliation.

In addition, the two mergers would reduce the number of significant participants in the local exchange market from six to four (Bell Atlantic/GTE, SBC/Ameritech, US West and

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[21] *Bell Atlantic/NYNEX Merger Order*, ¶ 123.

BellSouth). In the past, the government has disapproved mergers that would reduce the number of significant firms in the market to four, thereby increasing the likelihood of tacit collusion.[22]

Both SBC/Ameritech, and Bell Atlantic/GTE, have also argued that merger is critical to give them the necessary resources to engage in out-of-region competition. This argument is simply not credible. All of these incumbent LECs have resources and revenues vastly exceeding those of the majority of CLECs in the market, as well as much more experience in providing local exchange service.

Even if the argument were valid, however, it would, if anything, counsel against the incumbent LECs' entering one another's territories. If the larger size of SBC/Ameritech makes it a more viable competitive threat to Bell Atlantic/GTE, Bell Atlantic/GTE would be less likely to enter SBC/Ameritech's markets. And for the same reason, the additional resources of Bell Atlantic/GTE would deter SBC/Ameritech from raiding its territory. For this reason as well, the sheer size and resources of the combined companies increase the incentive of each to adhere to a tacit agreement to maintain a geographical division of territory.

The Commission has recognized that competition can be harmed "if a merger increases the potential for coordinated interaction by firms remaining in the post-merger market."[23] Coordinated interaction is defined as "'actions by a group of firms that are profitable for each of

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[22] *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (reduction to four firms "will make it easier for leading members of the industry to collude"); *Hospital Corp. of America v. FTC,* 807 F.2d 1381, 1387 (7th Cir. 1986) ("As a result of the acquisitions the four largest firms came to control virtually the whole market, and the problem of coordination was therefore reduced to one of coordination among these four.").

[23] *Bell Atlantic/NYNEX Merger Order*, ¶ 121.

them only as a result of the accommodating reactions of the others.'"[24] The Commission has determined that the local telecommunications market is a likely arena for merger-induced coordinated interaction because the incumbent LEC has access to significant information about its rivals' activities, making it difficult for any participant to "cheat" on a tacit agreement.[25] The same analysis may be applied to the incumbent LECs' geographical division of territories. SBC/Ameritech would obviously know in advance if Bell Atlantic/GTE were planning to invade its territories, and vice versa, since each company's CLEC will need to have state certification and an interconnection agreement with the incumbent before even beginning to solicit customers in the other's territory. In these circumstances, it would be impossible for either to "cheat" on a tacit agreement to maintain a geographical division. In short, a tacit mutual non-aggression pact between two giants, rather than competition, is the likely result of these mergers.

C. Bell Atlantic and GTE Both Have A History Of Abusing Their Monopoly Positions And Resisting Implementation Of The Telecommunications Act of 1996.

In reviewing this merger and the SBC/Ameritech merger, the Commission's principal focus should be on the failure of the incumbent LECs to comply with their obligations under the Telecommunications Act of 1996 to open their local exchange markets to competition. While competition is thriving in other telecommunications markets, the local exchange markets remain dominated by the incumbent monopolists.

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24 *Id.*

25 *Id.*, at ¶ 122.

As noted, a reduction in the number of significant incumbent LECs from six to four – with two companies controlling over two-thirds of all access lines nationwide – will increase the incentive of the merged companies to further resist opening their markets and to maintain the present geographical division of local markets. The likelihood that these enhanced incentives will prevail is enhanced by Bell Atlantic's and GTE's histories of using their monopoly positions to side step their obligations under Sections 251 and 252 of the 1996 Act. The record demonstrates that Bell Atlantic and GTE each pursue a philosophy dedicated to the continuing viability of the monopoly model of local telephone service. This management philosophy makes it particularly likely that the merged company will succumb to the anti-competitive incentives created by this merger, rather than responding in a cooperative manner to the forces of change currently at work in the telecommunications market.

KMC has had first-hand experience with Bell Atlantic's refusal to comply with its obligations under the 1996 Act. Contrary to Section 251(c)(4) of the Act and the Commission's directives in the *Local Competition Order* and the BellSouth South Carolina and first Louisiana Section 271 Orders, [26] Bell Atlantic has refused to make contract service arrangements ("CSA")

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[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, at ¶ 956 (1996), *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, Nos. 97-826, *et al.* (ILECs must make customer contracts available for resale at a wholesale discount); *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services In South Carolina,* 13 FCC Rcd 539 (1997) (BellSouth's refusal to offer customer specific contract service arrangements at a discount violates Section 251(c)(4) of the FTA, impedes competition for large volume customers and impairs the use of resale as a vehicle for competitors to enter the local exchange market); *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services In Louisiana,* 13 FCC Rcd 6245 (1998) (BellSouth may not shield customers from competition by refusing to make existing

available for resale. Despite the fact that the Bell Atlantic itself has already litigated and lost this issue in several states,[27] Bell Atlantic still refuses to make CSAs available for resale in other jurisdictions. As a result of Bell Atlantic-Virginia's refusal to process orders for contract customers who wish to take service from a reseller, KMC was forced recently to seek relief from the Virginia State Corporation Commission to enforce its rights under Section 251(c)(4) of the Act.[28] Bell Atlantic takes the position that it may and will terminate a CSA if the customer elects to take service from a reseller, thereby not only subjecting the customer to onerous termination charges, but also removing from the market the very product the CLEC wants to resell.[29] By compelling CLECs to litigate this issue in every market where it operates, Bell Atlantic is able to shield its contract customers from competition -- at least until the litigation is concluded.

For its part, GTE has adopted a very aggressive posture in refusing to make arbitrated interconnection rates available to CLECs except under limited circumstances. Although a number of State Commissions have established in arbitration proceedings the interconnection, resale and

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customer specific contract arrangements available for resale at a wholesale discount)

[27] *See, e.g., Complaint and Request of CTC Communications, Inc. For Emergency Relief Against New York Telephone d/b/a/ Bell Atlantic-New York For Violation Of Sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, Section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915,* Case 98-C-0426, Order Granting Petition (N.Y.P.S.C. Sept. 14, 1998); *CTC Communications Corporation Petition for Enforcement of Resale Agreement and to Permit Assignment of Retail Contracts*, DR 98-061, Order No. 23,040 (N.H.P.U.C. Oct. 7, 1998).

[28] *KMC Telecom of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, Case No. ________ (filed November 20, 1998 with the Virginia State Corporation Commission).

[29] *Id.*

UNE rates that GTE may charge its competitors, GTE will not make those rates available to another CLEC unless the CLEC invokes its rights under Section 252(i) of the Act and opts into the previously approved interconnection agreement that resulted from the arbitration. What this means is that a CLEC must either waive its right to negotiate terms or conditions different than those previously agreed to by another CLEC or file its own arbitration petition to secure the same rates that the State Commission has already ordered GTE to make available to another carrier. This exercise serves no useful purpose in terms of promoting the development of competition in the local exchange market. On the contrary, it forces CLECs to expend resources needlessly, prolongs the process for obtaining an interconnection agreement and thereby delays the entry of CLECs into GTE markets.

II. THE MERGER IS NOT LIKELY TO CREATE A VIGOROUS COMPETITOR IN OTHER MARKETS

A. The Merged Company Is Not Likely To Increase Competition In The Local Exchange Market.

Bell Atlantic and GTE argue that the merger will benefit local competition, because the merged company will undertake an ambitious campaign to provide facilities-based local competition outside of their existing regions. They argue that neither merger partner alone could undertake such a campaign, but that the merged company can and will. This argument does not withstand scrutiny. GTE is already a huge company, fully capable of an out-of-region competitive campaign. Indeed, GTE's Chairman and CEO has said he is "confident about GTE's ability to succeed in the competitive marketplace <u>without</u> entering into a major transaction or combination with another company. In other words, we can go it alone and win."[30] GTE's 1997 revenues were $23.2 billion and it had net income of $2.7 billion.[31] Bell Atlantic is even bigger than GTE, with 1997 revenues of $30.2 billion and net income of $2.4 billion.[32]

GTE and Bell Atlantic name AT&T, MCI WorldCom and Sprint as their principal competitors. Of these three, the 1997 figures show that GTE and Bell Atlantic are both larger than Sprint ($14 billion revenue, $952 million net income[33]), comparable to MCI WorldCom ($27 billion revenue, $592 million net income[34]), and smaller only than AT&T ($51 billion revenue, $4.3 billion net income[35]). In terms of both revenues and net income, GTE and Bell Atlantic individually dwarf even the largest companies in the next tier of CLEC competitors.[36] They can hardly argue that they need to merge because one of their competitors (AT&T) is larger than they are. Under that rationale, mergers would always be allowable until only two companies were left

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30 GTE Corporation, Annual Report 1997, "Chairman's Message" (emphasis in original).

31 GTE Corporation, 1997 Annual Report

32 Bell Atlantic, Investor Information, http://www.bell-atl.com/invest/financial/statements/income annual.htm (visited November 10, 1998)

33 Sprint 1997 Annual Report

34 WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

35 AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii

36 A recent Merrill Lynch report estimated that as of the end of the first quarter of 1998, the CLECs collectively had a 3.5% share of the $101 billion annual local market revenues – amounting to approximately $ 3.85 billion. Merrill Lynch, "Telecom Services – Local, CLECs: What's Really Going On" (June 19, 1998), at pp. 5, 9.

in each market. Significantly, AT&T's larger size has not yet resulted in its capturing a significant share of the local exchange market.

Moreover, the very substantial foreign investments that both GTE and Bell Atlantic have made belie the assertion that they are incapable -- without this merger -- of doing business outside of their own regions. GTE's international operations "stretch from British Columbia and Quebec in the north, to the Dominican Republic, Puerto Rico and Venezuela to the south."[37] Bell Atlantic has wireless investments in Mexico, Italy, Greece, Slovakia and the Czech Republic, and wireline investments in the UK, Thailand, Indonesia and the Philippines."[38] The applicants have not explained why, if they can enter new markets abroad on their own, they cannot also do so in this country.

The applicants also admit that GTE is already well-positioned to provide facilities-based competition in many cities where its network comes close to a metropolitan area and/or it is already providing service in an adjacent area.[39] Nonetheless, they contend that GTE lacks the relationship to major corporate customers - the asset that Bell Atlantic brings to the table -- that would justify such expansion. Apparently, GTE does not want to compete until it can obtain the advantage of "anchor customers" through a Bell Atlantic connection.[40] Lack of access to such a huge customer base has not prevented CLECs from constructing networks to provide local exchange service.

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[37] Public Interest Statement at 14 n.10.

[38] *Id.*

[39] Public Interest Statement at 1-2, 6-7.

[40] Kissell Affidavit, at ¶ 7.

Although many of the CLECs competing for large corporate customers do not have the advantage of existing "anchor customers," CLEC competition for large corporate customers is beginning to become significant.[41] Moreover, the "anchor customers" that CLECs such as MCI WorldCom and Sprint have were originally acquired the old fashioned way – by competing for them in the open market. There is no reason why GTE and Bell Atlantic cannot seek "anchor customers" in another ILECs' territory in the same way. Basically, the "anchor customer" argument is a proposal by Bell Atlantic to use the customer relationships it obtained as a local exchange monopolist within its present region to leverage its way into out-of-region markets. Under this proposal, the merged company would be "employing [its] monopoly power as a trade weapon against [its] competitors." *United States v. Griffith*, 334 U.S. 100, 107 (1948). That does not represent a benefit of the proposed merger. Instead, it is another anticompetitive effect.

GTE has ample resources to support an aggressive marketing campaign. It is already in several suburban markets adjacent to prime urban markets now controlled by BOCs. It is already in a position to, and in fact does, offer corporate customers long-distance and advanced data-transmission services. It does not need existing "anchor customer" relationships to mount a credible marketing campaign for out-of-region corporate customers, and to use that campaign as a platform for reaching smaller businesses and residential customers. The fact that GTE has not done so may indicate nothing more than its determination that the merger route is cheaper and less risky than out-of-region competitive marketing, and thus will be pursued unless and until the Commission makes clear that the merger wave in this industry has gone far enough.

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[41] *MCI/WorldCom Merger Order*, ¶¶ 172-182.

Even if the merged company does go out-of-region to compete for customers, that competition will be focused on large business customers -- the one segment of the local exchange market that the Commission has found is already on the road to becoming competitive. GTE concedes that the initial focus of the merged company's out-of-region competition will be to "build on Bell Atlantic's existing account relationships with large businesses."[42] As the Commission found in the *MCI/WorldCom Merger Order*, while the incumbent LECs still dominate the larger business market, "they face increasing competition from numerous new facilities-based carriers in serving the larger business market."[43] Thus, to the extent that the merged company's out-of-region competition plan is limited to a segment of the local market that is already becoming competitive – rather than bringing competition to the residential and small business segments where significant competition has not yet developed -- the public benefit is limited.

The applicants also argue that once they have built facilities to serve large business customers, they will have a platform from which to mount a credible competitive campaign for small business and residential customers. As demonstrated by the small inroads that CLECs have made into the residential and small business market, however, the incumbent LECs have succeeded in restraining competition in the segment of the market where CLECs are most dependent on their cooperation. CLECs that have built their own facilities to serve large corporate customers are still dependent on the facilities of the incumbent LEC to serve small

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42 Kissell Affidavit, at ¶ 7.

43 *MCI/WorldCom Merger Order* at ¶ 172.

business and residential customers through the use of UNEs or resale. Bell Atlantic and GTE have not claimed that they will not be similarly dependent on ILEC UNEs or resale to reach small business and residential customers outside of their home territories, and there is no reason to believe that they will be any more successful at overcoming ILEC resistance than other CLECs have been.

Moreover, the merged company will have a strong disincentive to compete out-of-region. As previously discussed, any out-of-region competitive campaign by the merged company would carry the risk of retaliation by the incumbent LEC – a risk that CLECs do not face, because they have no home region against which retaliation could be targeted. It is likely that, because of the danger of retaliation, the merged company will continue to participate in the present tacit agreement to divide territories, and refrain from any serious out-of-region competition.

In short, the merged company, if it competes out-of-region at all, is not likely to bring competition to the segments of the local exchange market that most need it. Thus, the claimed public interest benefit from the merger in the local exchange market is very limited, and not sufficient to outweigh the merger's anticompetitive effects. The solution to the lack of competition in the local exchange market is to enforce the pro-competitive initiatives of the 1996 Act — not to approve an anti-competitive merger on the basis of a dubious promise that the merged company will successfully become a significant local competitor in markets where CLECs have not yet been able to overcome the incumbent LEC's resistance to market-opening measures.

B. The Merger Will Not Bring Significant New Competition to the Long-Distance Market

Bell Atlantic and GTE claim that the merger will enhance competition in the long-distance market, by enabling the merged company to construct and operate a national long distance network. They assert that there are presently only three "fully national facilities-based carriers" (MCI WorldCom, AT&T and Sprint), and that a fourth national network will add significantly to competition.[44] GTE unsuccessfully made a similar argument in opposition to the MCI/WorldCom merger where it contended that the merger would harm competition in the long-distance market by reducing the number of national networks from four to three. The Commission rejected that argument, on the ground that "the supply of transmission capacity is expanding significantly with the construction of four new national fiber-optic networks by Qwest, IXC, Williams, and Level 3."[45] In light of this new capacity, the Commission found that there would be a sufficient number of national facilities-based carriers to "constrain any attempted exercise of market power," and that the "new carriers likely will be able to constrain any coordinated exercise of market power by the incumbents."[46] The Commission concluded that "the coverage of the new networks is sufficient to provide competitive national long distance service."[47] The addition of an eighth national network, in a market the Commission has already found to be competitive, can hardly be claimed as a significant public interest benefit.

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44 Public Interest Statement at 4, 18-20.

45 *MCI/WorldCom Merger Order*, at ¶ 43.

46 *MCI/WorldCom Merger Order,* at ¶¶ 51, 64.

47 *MCIWorldCom Merger Order,* at ¶ 54.

Any suggestion that neither GTE nor Bell Atlantic could build an eighth network without the merger – assuming the market demand for such a network exists – cannot be taken seriously. Bell Atlantic and GTE are vastly larger companies than Qwest, IXC, Williams or Level 3 – the companies identified by the Commission as building the four new national fiber-optic networks that will guarantee the continued competitiveness of the long-distance market.[48] Nor did these companies have the built-in supply of Fortune 500 "anchor customers" that Bell Atlantic has and GTE is seeking through the merger. The achievements of Qwest, IXC, Williams and Level 3 demonstrate that significant, competition-enhancing network investments can be made without the customer base that GTE says it needs to acquire.

III. THE ANTICOMPETITIVE EFFECTS OF THE MERGER CANNOT BE ALLEVIATED SIMPLY BY IMPOSITION OF CONDITIONS

In approving the Bell Atlantic/NYNEX merger, the Commission imposed conditions that were designed to mitigate the potential anticompetitive effects of the merger. Experience demonstrates, however, that the imposition of conditions does not guarantee compliance, and therefore is not sufficient to alleviate a merger's anticompetitive effects. The Commission currently has before it MCI's complaint charging Bell Atlantic with numerous violations of the

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[48] GTE's revenue for 3Q 1998 was $6.4 billion, and Bell Atlantic's was $7.9 billion. Qwest's was $880 million; IXC's $185 million, and Level 3's $106 million. See http://www.gte.com/g/3Q98/table1.html (visited October 21, 1998); http://www.bell-atl.com/invest/financial/quarterly/3q98.html; (visited November 9, 1998); http://www.qwest.net (visited November 2, 1998); http://www.level3.com (visited November 2, 1998); http://www.ixc-investor.com/press.html (visited November 9, 1998).

conditions.[49] Moreover, as noted above, KMC and other CLECs have also had to file complaints with State Commissions to compel Bell Atlantic to comply with its statutory resale obligations.

The likelihood that conditions will be ineffective in this case is particularly high because both Bell Atlantic and GTE have a history of resistance to the market-opening requirements of the 1996 Act. It is fair to assume that the merged company will continue to resist the implementation of measures designed to open the local exchange market to competition in spite of any conditions that the Commission may attach to approval of the merger.

IV. IF THE MERGER IS APPROVED, THE COMMISSION MUST IMPOSE STRINGENT CONDITIONS

If this merger is approved, stringent conditions are needed to ensure that the merged company will truly open its markets to competitive entry, and swift sanctions are essential to address any failure to comply with these market-opening conditions. Pursuant to both the Communications Act and the Clayton Act, the Commission has ample authority to impose such conditions as are necessary to serve and protect the public interest in encouraging the development of competition in the local exchange market.[50]

A. Conditions

At a bare minimum, the merged entity's operations in the GTE service territories should be subject to the Bell Atlantic/NYNEX merger conditions. The Commission should also impose additional conditions in an effort to mitigate the potential adverse competitive effects of the

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[49] *Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.*, File No. E-98-32 (filed Mar. 17, 1998).

[50] *Bell Atlantic/NYNEX Merger Order*, ¶¶ 29-32.

merger. Specifically, the Commission should impose the following conditions on approval of the merger over and above the conditions imposed in the Bell Atlantic/NYNEX merger order.

1. ***Section 271 of the Act Should Apply to GTE Post Merger:*** GTE has been free to provide long distance service both inside and outside its existing service territories since the passage of the Telecommunications Act in February 1996. By the end of 1996, GTE was selling long distance service in all 50 states, including the Bell Atlantic/NYNEX states.[51] Because Section 271 of the Act currently bars Bell Atlantic (and its affiliates) from originating long distance services in the Bell Atlantic and NYNEX in-region states, Bell Atlantic should not be permitted to retain GTE's long distance customers in those states once the merger is approved. If the merged entity is permitted to continue to provide long distance service to GTE's customers in the Bell Atlantic and NYNEX service territories before Bell Atlantic is found to have met the Competitive Checklist and all of the other requirements of Sections 271 and 272, the statute would be gutted. Indeed, if the merged entity is permitted to provide long distance service to GTE's existing customer base, any BOC could completely evade the requirements of Sections 271 and 272 simply by acquiring a long distance service provider. Consistent with Congressional intent to keep the BOCs out of the in-region long distance market until they have demonstrated to the Commission's satisfaction that they have opened their local markets to competition (which Bell Atlantic has not done), GTE must relinquish its long distance customers in the Bell Atlantic and NYNEX states as a condition of merger approval.

[51] GTE 1996 Annual Report, http://www.gte.com/AboutGTE/annual1996/intro/intro.html.

GTE should also be required to relinquish its long distance customers in the service territories in which GTE is the incumbent local exchange carrier until it can demonstrate compliance with Section 271. Although Section 271 of the Act by its terms applies only to the BOCs, the Commission should hold GTE to the standards of Section 271 in all service territories in which it is the incumbent local exchange carrier as a condition of approval of the merger.[52] As discussed above, GTE has succeeded in keeping competition to a minimum in its service territories. Once the merger is completed, there is no reason to believe that Bell Atlantic/GTE will not employ the same tactics to delay and impede the entry of competitors in the former GTE service territories. Without the prospect of Section 271 relief, Bell Atlantic has no incentive to do what is necessary to open the GTE service territories to competition. If GTE is going to enjoy the benefits of being owned by a BOC, it should be subject to the same statutory obligations and constraints as a BOC, including the requirement that it open its local markets irreversibly to competition as a precondition to offering long distance service.

2.. ***Availability of Cost-Based Rates in GTE Service Territories:*** As a condition of approval of the Bell Atlantic/NYNEX merger, the Commission required the merged entity to offer all competing carriers upon request "rates for interconnection, UNEs, and transport and termination that are based upon the forward-looking economic cost of providing these items."[53] Post-merger, Bell Atlantic should also be required to offer all competing carriers in GTE territories, including those with whom GTE has prior agreements, TELRIC rates for

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[52] *Bell Atlantic/NYNEX Merger Order*, ¶ 178.

[53] *Id.*, ¶185.

interconnection, UNEs, and reciprocal compensation. As noted above, GTE's refusal to make the rates established by State Commissions in arbitrated proceedings available to other CLECs unless the CLECs opt into the arbitrated agreements pursuant to Section 252(i) of the Act has limited the options available to CLECs seeking to compete in GTE's markets. Making TELRIC rates available to all carriers without restriction is essential to opening the GTE markets to competition.

3. ***Bell Atlantic/GTE Should Be Required To Eliminate Resale Restrictions:*** In the Bell Atlantic/NYNEX merger proceeding, the Commission declined to adopt a separate condition requiring the merged entity to make its retail services available for resale without restriction at wholesale rates on the grounds that the conditions that were adopted would ensure Bell Atlantic's compliance with Section 251(c)(4) of the Act.[54] Unfortunately, as discussed above, the Commission's assumption that the existing conditions were sufficient to compel Bell Atlantic's compliance with its resale obligations has not proven to be true. Bell Atlantic's refusal to make CSAs available for resale is an unreasonable restriction prohibited by Section 251(c)(4) of the Act and serves to deter end users from availing themselves of the competitive opportunities envisioned by the Act. The Commission should take this opportunity to reconsider its position and require Bell Atlantic to eliminate the restrictions on the resale of CSAs as a condition of approval of the merger.

4. ***Bell Atlantic/GTE Should Be Required To Recover Interim Number Portability Costs In A Competitively Neutral Manner:*** In the *Number Portability Order*,[55] the Commission

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[54] *Id.*, at ¶216.

[55] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("*Number Portability Order*").

concluded that the costs of providing interim number portability ("INP") must be recovered from all carriers in a competitively neutral manner. In direct contravention of the Commission's interpretation of the Act, GTE has proposed in state after state that it should be permitted to recover the full cost of providing INP from new entrants.[56] The position GTE is advocating was specifically rejected by the Commission in the *Number Portability Order* in favor of alternative proposals that would ensure that new entrants did not bear the full cost. Rather than forcing competitors to fight this issue in every GTE jurisdiction, the Commission should compel Bell Atlantic, as a condition of approval of the merger, to offer a competitively neutral INP cost recovery mechanism in the GTE states. Any such cost recovery mechanism must be consistent with the alternatives set forth in the *Number Portability Order.*

5. ***The Commission Should Require Monthly Performance Reports:*** The Commission should also require the merged entity to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the Bell Atlantic/NYNEX merger.[57] Since Bell Atlantic is already compiling data on a monthly basis under the existing merger conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference to a CLEC in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed Bell Atlantic/GTE, which would have

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[56] Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

[57] *Bell Atlantic/NYNEX Merger Order*, at Appendix C.1.d.

a monopoly market share and bottleneck control of essential facilities across such a large area of the nation.

6. **The Commission Should Establish Performance Standards**: The Commission should attach conditions to the merger compelling Bell Atlantic/GTE to satisfy certain levels of performance in providing interconnection services, UNEs, and resold services to competitors. For each reporting category, Bell Atlantic/GTE should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when Bell Atlantic/GTE is discriminating in the provision of service.

KMC realizes that the Commission tentatively concluded in its OSS rulemaking that it would be "premature" to develop performance standards.[58] There is no other means available, however, to ensure that Bell Atlantic/GTE will provide service in a nondiscriminatory manner. If the Commission believes there is not enough evidence on the record to establish sufficiently detailed performance standards, it could adopt interim performance standards that are based upon how Bell Atlantic/GTE provides service in the context of its retail operations. Specifically, the Commission could first direct Bell Atlantic/GTE to identify a level of performance that mirrors its own self-provisioning of service, and after several months of reports, the Commission could revisit this issue and adjust the standards as necessary. Alternatively, the Commission could utilize a "floating" standard of performance for each category, such that the standard for each month would be set by looking at Bell Atlantic/GTE's performance in running its retail operations

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[58] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

during that month. In either case, these standards could be superseded once permanent performance benchmarks are established in the Commission's OSS proceeding.

B. Sanctions

The Commission should also ensure that Bell Atlantic/GTE cannot evade compliance with any merger conditions that are imposed. As a practical matter, it will be extremely difficult, if not impossible, to undo the merger once it has been consummated. (Although that might be the only effective sanction). As an alternative, the Commission should establish a system of strict financial penalties for Bell Atlantic/GTE's failure to adhere to the performance standards incorporated in the merger conditions.

For example, if Bell Atlantic/GTE's performance vis-a-vis a CLEC in any category falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of $75,000 for each month that the substandard performance continues. Adopting such financial penalties would help deter Bell Atlantic/GTE from engaging in anticompetitive conduct.

The Commission should also create an entirely separate system of penalties to be assessed in the event Bell Atlantic/GTE violates other, non-performance related merger conditions. For example, if Bell Atlantic fails to remove resale restrictions or to offer TELRIC rates in GTE service territories, the Commission should impose a fine of $500 per day for each violation. Section 502 of the Act, 47 U.S.C. § 502, authorizes the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. The threat of such sanctions hopefully will provide a strong incentive for Bell Atlantic/GTE to scrupulously comply with the merger conditions.

CONCLUSION

For the foregoing reasons, the Commission should deny the GTE applications for transfer of control. In the alternative, the Commission should impose strict conditions on the merged entity to promote competition in their extensive service territories and should adopt steep financial penalties for failure to comply with the conditions.

November 23, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary C. Albert, hereby certify that on this 23rd day of November 1998, copies of the foregoing **KMC Telecom. Inc.'s Opposition To Applications For Transfer of Control of GTE Corporation** were served on the following parties via first-class U.S. mail, postage pre-paid:

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